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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 524

NORRIS & HIRSHBERG, INC.,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOSEPH B. BRENNAN,
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CARL MCFARLAND,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Your petitioner, Norris & Hirshberg, Inc., prays that a writ of certiorari be issued to review a final order of the United States Court of Appeals for the District of Columbia taking jurisdiction of a review proceeding respecting an order of the Securities and Exchange Commission.

Opinions Below

The opinion of the Securities and Exchange Commission respecting the record issues here involved (R. 163-174) is not yet officially reported (Release No. 3926, March 11, 1947). Its earlier opinion on the merits (R. 44-110), here not directly involved, is similarly unreported (Release No. 3776,

January 24, 1946, as amended April 17, 1946). The opinion of the court below dated February 17, 1947 (R. 146-152) was amended June 5, 1947, and is set forth at (R. 153-160) and is also reported at 163 F. 2d 689.

Jurisdiction

The first order of the court below remanding the cause to the Securities and Exchange Commission for defects of record was entered February 17, 1947 (R. 161). On July 16, 1947, the Commission's motion for stay of execution was denied and the record filed by it with the court was ordered returned to the Commission (R. 193). On September 25, 1947, the Commission refiled the record with corrections (R. 194). Thereupon petitioner's motion for judgment and remand upon the refiled record was denied by order of November 19, 1947 (R. 198). Petitioner's request for rehearing was denied by order of January 5, 1948, and the court below stayed proceedings there on the merits provided this petition be filed by January 12, 1948 (R. 199-200). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)).

Questions Presented

Whether, pursuant to a statute requiring as a prerequisite to jurisdiction of the reviewing court that first "*the Commission* shall certify * * * the record *upon which* the order complained of *was entered*," a statutory reviewing court obtains jurisdiction where—

1) after challenge of a filed record admittedly incorrect because of material inclusions and exclusions, the reviewing court permitted the agency to make mere corrections without even an explanation as to whether the correct record

was actually the one utilized for administrative consideration and decision;

2) after challenge of the identity of the filed record on the ground that a prejudicial summary had been utilized by the Commission as the basis for decision in lieu of the hearing record, the agency pleaded that it would "neither affirm nor deny" the fact and the court took no action thereon; and

3) despite the circumstances and the Commission's admission that its certification necessarily rested on a presumption that the commissioners who decided the case performed their duty, the court accepted the Commission's certificate of record as conclusive as to the genuineness of the filed record.

Statute Involved

Section 25 of the Securities Exchange Act of 1934 provides in relevant part as follows (15 U. S. C. 78y):

> Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia, by filing in such court * * * a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. * * *

The proper interpretation and due enforcement of the last two sentences of the above quotation are in issue here.

Statement

Pursuant to the statute petitioner filed in the court below its petition for review of respondent's order depriving petitioner of its right to continue in the business of a broker-dealer (R. 113-124).[1] Pursuant to the same statute respondent, after service, was required to "certify and file in the court a transcript of the record upon which the order complained of was entered" (15 U. S. C. 78y). A purported record was thereupon filed by respondent (R. 206-207). Petitioner then filed with the court below its petition for common-law writ of certiorari alleging defects of record and calling for the production of the record required by the statute (R. 128-133).[2] After the pleadings were closed (R. 135-139) the court heard oral argument, wrote an opinion (R. 146-152), and remanded the case and the filed record to the Commission (R. 161, 193).

Thereupon the Commission refiled the record with corrections (R. 194). Petitioner moved for the entry of a further judgment of reversal and remand or other appropriate relief (R. 197) which the court denied, simultaneously ordering petitioner to proceed upon the merits on the refiled record (R. 198). By the latter order the court below finally settled and adjudicated, for the purpose of all further proceedings before it, the issue respecting its jurisdiction notwithstanding defects of record. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258-259; *McClel-*

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[1] The order complained of was based on findings of fact contrary to the findings of the trial examiner before whom sixty-seven witnesses testified in person. The examiner found that in point of facts none of the charges had been proved.

[2] Pursuant to the "all writs" section of the code empowering the Court "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." D. C. Code 1940, 11-208; *Sullivan* v. *District of Columbia,* 19 U. S. App. D. C. 210, 216. See also *United States* v. *Adams,* 9 Wall 661, 663; *In re Chetwood,* 165 U. S. 443, 462.

land v. *Carland*, 217 U. S. 268. Request for rehearing was denied (R. 199-200).

In the course of these proceedings it was pointed out by the court below: (1) That the petitioner charged, and the Commission admitted, that thirteen exhibits of importance to its defense were represented in the record originally filed as having been received "for identification only" (R. 156). (2) That the Commission similarly admitted (R. 156):

> that the transcript contains as Commission exhibits twelve documents which not only were not received in evidence, but were not offered as such, having been made up and attached after the record before the trial examiner had been closed.

(3) With respect to the substituted and prejudicial summary allegedly utilized in lieu of the record for purposes of the Commission's decision, the court below ruled that the merit of the challenge, the facts with respect to which the Commission refused to affirm or deny (R. 138) and hence stood admitted (R. 155), "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). (4) It also ruled that a certification of record by the Commission's chief file clerk did not satisfy the statutory requirement (15 U. S. C. 78y) that "the *Commission*" shall certify as to the record "upon which" the order complained of "was entered" (R. 157-158).

The court below properly ruled that, under the statute, it was (R. 159):

> vitally concerned with knowing that the record considered by the Commission was in fact a true record; which means that it is of first importance for the court to know whether, in reaching its decision, the Commission considered as evidence all the matter which was introduced as such, and nothing more. That was its duty. If the duty was not performed, the order was void *ab initio*, and there is no occasion for judicial re-

view to determine whether an inaccurate record shows substantial evidence to support it.

The court rejected several attempts of the Commission to merely patch up and correct the record as filed (R. 135-145, 161-162, 175-193) and, as stated above, remanded the case and returned the filed record to the Commission (R. 161, 193). But when thereafter the Commission merely returned the corrected record (reduced to 3575 pages) to the court with a new certificate in the same statutory language (R. 194), the court below apparently regarded itself as estopped from proceeding further respecting the record (R. 199-200).

The court accepted the Commission's certificate as conclusive of facts essential to the court's jurisdiction, in the face of the Commission's prior admission that the certificate was necessarily based on a presumption.[3] Accordingly, the ultimate issue in this case is whether an agency's certificate precludes a reviewing court from finding or inquiring into the actual facts as to the identity of the transcript upon which it is required to review the agency's order under circumstances where the certificate is admittedly based on a presumption contrary to evidence before the court.

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[3] The Commission gave the court the following explanation of its understanding of the meaning of its certificate in this case where there had been a change of membership of the Commissison between its decision and certification: "The entry of the order complained of and the adoption by the Commission of its findings and opinion were its solemn official acts, and as such implied that the commissioners participating conscientiously discharged their official function in the case • • • We believe it follows that the act of certification by the Commission can purport to be no more than an assurance by the Commissioners now certifying that they conscientiously regard the record they certify as a 'transcript of the record upon which the order complained of was entered'" (R. 189-190).

Specifications of Errors to Be Urged

The court below erred:

(1) In entering its orders of November 19, 1947, and January 5, 1948, whereby it took jurisdiction to review the merits;

(2) In permitting the Commission to merely correct the filed record without showing that it was the record actually relied upon by the Commission for its consideration and decision of the case;

(3) In declining to enter a judgment of reversal and remand after the Commision had chosen to "neither affirm nor deny" that it had actually utilized for purposes of its consideration and decision a substituted and prejudicial "summary" instead of the hearing record filed with the court;

(4) In refusing to find or determine the facts after due challenge by the petitioner of the correctness and identity of the record used by the agency for purposes of decision of the order submitted for review;

(5) In declining to pass upon the lawfulness of the Commission's action in delegating to subordinates its statutory function of certifying records for purposes of judicial review; and

(6) In regarding the certification of record last filed as conclusive despite the admitted irregularities and other circumstances of the case.

Reasons for Granting the Writ

IN TAKING JURISDICTION TO DETERMINE THE MERITS IN THIS CAUSE THE COURT BELOW HAS DECIDED QUESTIONS OF IMPORTANCE IN CONFLICT WITH THE USUAL COURSE OF JUDICIAL DECISION AND HAS POSED STATUTORY ISSUES WHICH SHOULD BE PROMPTLY SETTLED BY THIS COURT.

The issue in this case is important both in the field of legislation and administrative law. Whether statutory requirements may be met by mere recitals is a question of consequence to Congress. More fundamentally, does the fair administration of justice permit a curtain to be drawn across the administrative utilization of records in cases required by statute to be considered and determined upon the transcript of a hearing?

To prevent inquiry in the circumstances of this case would make the elaborate paraphernalia of "fair hearing" largely illusory. It would make moot the refusal to disclose proofs and reliance upon secret records heretofore roundly condemned. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 300, 304. The issue is more fundamental than the mere preliminary right to introduce relevant evidence, the purpose of which is to assure that an administrative agency will act only "after consideration of all relevant information." *American Trucking Assns.* v. *United States*, 326 U. S. 77, 86. Here the petitioner has in part been denied an opportunity even to see the alleged evidence used against it prior to decision, which is much more than the lack of opportunity "to supplement and explain" which has been held a violation of the rudiments of fairness. *West Ohio Co.* v. *Commission*, 294 U. S. 63, 70-71. Certainly it is more of a departure from lawful process for the Commission to base its decision on a substituted and [illegible]cial summary of record than to proceed by "guesswo[illegible]retofore held to

be a violation of due process because arbitrary. *West Ohio Co.* v. *Commission*, 294 U. S. 79, 81-83.

In view of the importance of the issue and the consequences of further and costly proceedings upon a fatally defective record, this Court should grant the writ even though the action sought to be reviewed may be in a sense interlocutory. Under similar statutory provisions for judicial review this Court held the matter of filing the record to be truly jurisdictional. *In re Labor Board*, 304 U. S. 486, 493-494; *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 371. The court below has stayed proceedings upon the merits to permit the filing of this petition (R. 199, 200). The cause is properly one for review by this Court at this stage because of "the hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy". *U. S. Alkali Assn.* v. *United States*, 325 U. S. 196, 205.

By its action in this case the court below has decided a question of importance in conflict with the applicable decisions of this Court and contrary to the accepted and usual course of judicial decision. It has determined a statutory question which should be determined and settled by this Court as speedily as possible because of its importance in the field of administrative law. The necessity therefor is enhanced by the form of the action below. On the one hand the court below has set forth general requirements of law (R. 153-160, 163 F. 2d 689) but thereafter, without opinion or distinguishing circumstances, it has reversed itself (R. 198) apparently upon the theory that administrative recitals are conclusive (R. 199-200). Such a situation is bound to promote misunderstanding and foster litigation in connection with a fundamental and specific question which has not been but should be settled by this Court.

1. *The court below is without jurisdiction because it has merely permitted the agency to correct an admittedly faulty*

record without showing whether as corrected it was the record actually utilized for purposes of administrative consideration and decision.—Having corrected its listing of the record documents to show that petitioner's exhibits were actually introduced in evidence (R. 194-195) is not enough. There is no statement, finding, or evidence to indicate that this portion of petitioner's evidence was not actually dropped out of the case between the close of the taking of evidence and the filing of the record in the court below. That it was so dropped appears because the respondent Commission has persistently declined to state the facts and because its opinion of March 12, 1947, evasively states that "the index • • • was not part of the record before the Commission" and "had nothing whatsoever to do with our decisional process" (R. 164-165). The court below held, on these facts, that it was not advised "as to what sort of record the Commission did consider" (R. 160).

The disclaimer of the Commission in the cryptic terms of its "decisional process" is meaningless. The issue is not whether the paper labeled "index" was technically "part of the record" or was made up after the "decisional process," but whether it reflects an error as to the contents of the record as of the time it was considered by the Commission in making its decision and issuing its order. Petitioner had a statutory right to submit relevant evidence which the agency could not deny. *American Trucking Assns.* v. *United States,* 326 U. S. 77, 85-86; *Edison Co.* v. *Labor Board,* 305 U. S. 197, 225-226. After submittal of evidence at the administrative level it has *a fortiori* a right to have such submittals treated as evidence for purposes of administrative determination of the issues. Even if the evidence so submitted is not conclusive, "it may be decisive in the Commission's determination". *American Trucking Assns.* v. *United States, supra.* Here positive evidence has been furnished by the hand of a member of the Commis-

sion's staff (presumably informed on the subject because he executed the original filing of the record, made the certificate thereof, and was in general charge of such matters) to the effect that petitioner's thirteen exhibits were *not* then considered as admitted in evidence. Such being the case, both law and candor require at the very least that the Commission state unequivocally whether or not its official record keeper was mistaken. Its refusal to do even that much requires the conclusion that the Commission cannot in good conscience answer the question except in a manner prejudicial to the validity of its order in the case.

The same is true of the admittedly spurious Commission exhibits (R. 221-254, but see particularly the note at the foot of page 221). The Commission admits that its prosecuting staff "had prepared and inserted in the file the material in question" (R. 166). They were discovered at the time of the oral argument before the Commission and petitioner moved that they be deleted but, though admitting that they were improper and contained evidentiary matter not in evidence, the prosecutors objected to their removal (R. 257-259). Although the Presiding Commissioner then ruled that "those things will be removed" (R. 259), nearly two years later they turned up in the court below certified as evidence of record. The failure to remove these spurious exhibits from the record is all the more misleading in these circumstances, because the case was under consideration for seventeen months and the commissioners who consulted the record would obviously assume that it had been purged as directed.[4] Thus manifestly there

[4] The Commission's opinion of March 12 would now have it appear that the ruling of the Presiding Commissioner was somehow and secretly rescinded or overruled. "The Commission," says the administrative opinion (R. 166), "notwithstanding the ruling of the presiding commissioner that the material would be 'removed' has not directed the physical removal thereof but has determined that the material should remain in its own file where it was placed." The opinion then refers to "this decision not to

is violated the rule that "nothing can be treated as evidence which is not introduced as such." *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. With this requirement this Court has held that "there can be no compromise on the footing of convenience or expediency." *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292, 300-305.

The Commission plainly states that it does not construe the requirements of law as did the court below (R. 169):

> We construe the opinion as merely indicating that the prior certification leaves uncertain the record status of the exhibits in question. We further understand that this may be corrected by a certificate specifying that the material complained of is not regarded by the Commission as part of the evidence in the case * * *.

But there never was any uncertainty or dispute in the court below as to the "record status" of the exhibits. The question is whether they *were* regarded as part of the record *at the time of administrative consideration and decision*, not whether they are now so regarded. Respondent's present understanding is obviously immaterial. Its last filed certificate of record therefore admittedly does not meet the requirements of either general law or the statute specially applicable here.

2. *The court below is without jurisdiction because, upon a challenge that the Commission actually utilized a substituted and prejudicial "summary" instead of the hearing record filed with the court, the latter took no action despite*

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cause the physical removal of the matters from the files" and to "our decision to keep the material in our files" (R. 166, 168). If there was such a subsequent "decision," the transcript previously certified *and presently certified* is defective in failing to include it along with other minutes and rulings which are included. Moreover, if there was such a decision, respondent had not previously made it known to petitioner and such lack of notice in such a matter would of course be inconsistent with a fair hearing and repugnant to due process of law. *West Ohio Gas Co.* v. *Commission* (No. 1), 294 U. S. 63, 68, 70.

the pleading of the agency that it would "neither affirm nor deny" the fact.—The statute specially applicable here requires of the respondent Commission both that it keep "appropriate records" of its hearings (15 U. S. C. 78v) and produce and file in the reviewing court "the record upon which the order complained of was entered" (15 U. S. C. 78y). The practice of the Commission to utilize summaries of record is set forth in the relevant monograph of the Attorney General's Committee on Administrative Procedure. Senate Doc. 10, 77th Congress, pt. 13, pp. 92-95. In this case the examiner, who found the facts for petitioner but was reversed by the Commission, pointed out the misleading nature of the staff's summary of testimony in connection with requested findings of fact, saying (R. 14, n. 1):

> Commission counsel's requests 3-108 purport to be condensations of the testimony of each of the customer witnesses. However, they deal only with the direct examination [here conducted by the Commission's prosecutors], omit the developments of the cross examination, and ignore what was developed in respect of these witnesses by the testimony offered by the registrant.

In the court below petitioner pleaded that the Commission decided the case on a prejudicial summary instead of the hearing record (R. 132). The Commission refused to plead to the issue (R. 138). The court below then held that the issue "depends upon the nature of the summary and the use to which it was put by the Commission" (R. 158). But the Commission has significantly failed to deal with the subject in its otherwise exhaustive opinion of March 12, 1947 (R. 163-174). By its latest certification of record filed below it exalts form over substance by simply relying upon the statutory language for its certification (R. 194) and the court below apparently deemed itself estopped thereby (R. 199-200). Hence the requirement of the statute that the

actual record utilized for purposes of decision be filed with the reviewing court (15 U. S. C. 78y) has been set at naught.

3. *The court below erred in an important matter of federal statutory law because, despite the circumstances and particularly in view of the Commission's stated assumption of limited responsibility therefor, the court regarded the agency's certificate of record as importing absolute verity and hence conclusive.*—The statute requires that "the Commission" shall certify to the record filed in the reviewing court (15 U. S. C. 78y). No authority to delegate any such function appears. Consequently no subordinate has authority to speak for the Commission. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 146. The court below first so held (R. 151, 158). The Commission's opinion thereafter rendered states that the "certifications of Commission records for purposes of court review will be executed in the name of the Commission, by its Secretary" (R. 170, n. 8). Its theory is that "the necessity of delegation in connection with the certification process flows from the mechanical nature of the problem" and that its only function is to "rule upon any difference of opinion between the parties to the case and the subordinates to whom the mechanical process is so delegated" (R. 171, 173).[5] Therein the Commission

[5] Thereby the direction of Congress as set forth in the statute was and is set aside by administrative action Apart from the fact that the certification function is one which only the heads of the agency could fully perform, the duty is an important one which Congress has seen fit to lodge in the Commission alone. Due performance of such a statutory duty requires something more than reliance upon presumption, "mechanical process," or *pro forma* certification by a subordinate albeit "in the name" of the Commission. It is true that the personnel of the Commission may change, as it has in this case. That cannot override statutes and statutory rights. Administrative record systems ordinarily indicate who has used given documents and for what purpose. But here the official record was obviously and admittedly defective as shown by the filing of such a record originally in the court below by the Commission's official record keeper. The latter's understanding presumably reflects the true situation in the absence of the commissioners who actually decided the case.

overlooks that its more important statutory function is to represent personally to the reviewing court that the record certified was the sole basis for its decision.

The certificate is substantially the same in language as the previous certificates filed or tendered. It merely asserts, in the language of the statute, that the documents to which it is attached are those "upon which the order of the Commission complained of was entered" (R. 194). But the Commission has made it clear that it was not thereby representing any *fact* as to the identity of the record on which its decision was made. It rests this certificate on a mere presumption that its predecessors did their duty. It stated to the court below that, in the circumstances here, its certificate "can purport to be no more than an assurance by the commissioners now certifying that they conscientiously regard the record they certify" as "a transcript of the record upon which the order complained of was entered" (R. 190). In view of the circumstances and the Commission's interpretations, this assurance is without foundation.[6] Moreover, "recitals of * * * procedure cannot be regarded as conclusive" in a challenge of administrative action because "otherwise the statutory conditions could be set at naught by mere assertion." *Morgan* v. *United States*, 298 U. S. 468, 477. Consequently the order of the court below (R. 198), which apparently now regards the certificate as importing absolute verity (R. 199-200) despite

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[6] In the Commission's "opinion on remand" of March 11, 1947, which was filed with the court below, it was said (R. 174): "The Commission has no difficulty in certifying that the transcript of record heretofore certified in the case (excluding of course the post-decisional index) is an authentic transcript of the record upon which the orders complained of were entered." But that transcript admittedly contained the spurious exhibits (R. 137-138, 155-156, 257-259). The contrary cannot therefore now be assumed on the basis of a similar certificate attached to a later transcript which excludes such material.

the circumstances of the case and the evasions of the Commission,[7] makes a mockery of the statutory condition (15 U. S. C. 78y). Indeed, so interpreted, the legislative provision for a certificate defeats its own purpose by foreclosing inquiry.

Conclusion

Notwithstanding the several separate aspects of the action of the court below, the fundamental issue here is the integrity of the administrative process. Public and legislative confidence therein will not be promoted by permitting the basic question here involved to remain unsettled. At almost every sitting this Court hears arguments of less important administrative law issues. The statutory right to a real hearing, and the body of law which this Court has built to assure a fair hearing, both require that the nature and identity of the records used by administrative agencies for purposes of their consideration and determination of cases be determined. General admonitory or permissive language of this Court has not yet been applied to this spe-

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[7] Petitioner requested the court below to determine the facts (R. 133). After its order accepting the refiled and recertified record (R. 198), petitioner requested that it make findings and conclusions (R. 198-199). This, too, was denied (R. 199-200). The court did not even require the Commission to make an unequivocal statement as to the record utilized for purposes of decision. It did not remand the case for the purpose of making findings as to the record utilized nor, after the unspecified remand (R. 193), did the Commission undertake to make such findings. See *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 374-376. Findings by the court are particularly necessary where, as here, the cause must ultimately come directly to this Court for review. *Interstate Circuit* v. *United States*, 304 U. S. 55, 56-57. They are important in any case in order that petitioner may have an adequate opportunity for review by this Court. *Cleveland, etc. Ry.* v. *United States*, 275 U. S. 404, 414; *Public Service Commn.* v. *Wisconsin Tel. Co.*, 289 U. S. 67, 70-71; *Mayo* v. *Canning Co.*, 309 U. S. 310, 316; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 169, 171-172.

cific issue. It will promote the administration of justice if the problem posed by this case is authoritatively determined by this Court.

Respectfully submitted,

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